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No. 05-

IN THE

Supreme Court of the United States

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA,

Petitioner,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner and Respondent entered into a contract that included a provision that Petitioner is entitled to recover its attorneys' fees incurred in connection with the enforcement, protection, or litigation of its contractual and legal rights. Petitioner incurred attorneys' fees litigating its rights during the course of Respondent's bankruptcy case and sought to recover them from Respondent. Adhering to its prior decision in *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149 (9th Cir. 1991), the Ninth Circuit held that Petitioner could *not* recover its attorneys' fees because the relevant litigation in the bankruptcy court involved issues of federal bankruptcy law. The court reasoned that, as a matter of general federal common law, a party may not recover its attorneys' fees pursuant to a contract or state statute where the issues litigated involve matters of federal law because only federal law may authorize such a recovery. The question presented is:

Should the Court grant certiorari to resolve a conflict among nine courts of appeals concerning whether a litigant may recover attorneys' fees under a contract or state statute where the issues litigated involve matters of federal bankruptcy law?

PARTIES TO THE PROCEEDING

Petitioner is Travelers Casualty & Surety Company of America ("Travelers"), as Administrator for Reliance Insurance Company for itself, as successor-in-interest by merger with United Pacific Insurance Company, and for related Reliance Insurance Companies. Travelers is owned by Travelers Home Insurance Group Holdings, Inc., which, in turn, is owned by Travelers Property Casualty Corp., which, in turn, is owned by The St. Paul Travelers Companies, Inc. The St. Paul Travelers Companies, Inc. is a publicly traded company. Respondent is Pacific Gas and Electric Company ("PG&E").

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PRELIMINARY STATEMENT

This matter arises out of the chapter 11 bankruptcy case of respondent PG&E. Travelers issued surety bonds in favor of PG&E before PG&E commenced its bankruptcy proceeding, and PG&E executed a series of indemnity agreements in favor of Travelers in connection with Travelers' issuance of the bonds. Among other things, the indemnity agreements provide that PG&E is responsible for Travelers' attorneys' fees incurred in pursuing, protecting, or litigating its rights in connection with the indemnity agreements or the bonds.

During PG&E's bankruptcy case, Travelers incurred attorneys' fees in the course of asserting its rights, objecting to its treatment in the case, and defending litigation that PG&E brought against Travelers. The relevant proceedings and litigation involved questions of federal bankruptcy law. Travelers asserted a claim against PG&E for its attorneys' fees.

Adhering to its prior decision in *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149 (9th Cir. 1991), the Ninth Circuit held that Travelers could *not* have a claim for its attorneys' fees as a matter of law. The court reasoned that, although parties may be free to contractually allocate between them the burden of attorneys' fees incurred in litigating *state* law issues, they cannot do so with respect to litigating *federal* issues unless federal law specifically authorizes the allocation. Incorporating by reference its reasoning in *DeRoche v. Arizona Indus. Comm. (In re DeRoche)*, 434 F.3d 1188 (9th Cir. 2006), *reh'g denied*, No. 04-15258 (9th Cir. Feb. 8, 2006),[1] the Ninth Circuit determined that, even if a litigant has a general right to attorneys' fees under applicable state law, either by virtue of a contract valid under state law or by virtue of a state statute, the litigant's general right to fees cannot extend to fees incurred in litigating bankruptcy issues because federal law does not *authorize*

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[1] A petition for writ of certiorari will also be filed in the *DeRoche* case.

such a recovery. Significantly, no federal statute directs or requires this result. Instead, the court simply applied its rule as a matter of general federal common law.

Three other courts of appeals apply the *Fobian* rule in the context of litigating bankruptcy issues and have denied any right to attorneys' fees. *See Burns v. Great Lakes Higher Ed. Corp. (In re Burns)*, 3 Fed. Appx. 689, 691 (10th Cir. 2001) (unpublished); *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*, 205 F.3d 532, 535 (2d Cir. 2000); *In re Sheridan*, 105 F.3d 1164, 1166-68 (7th Cir. 1997).

In contrast, five courts of appeals reject the *Fobian* analysis and allow the recovery of attorneys' fees in the context of litigating federal bankruptcy issues if allowed under applicable state contract law or state statute. *See Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286, 1290-91 (11th Cir. 2005) (rejecting Seventh Circuit's decision in *Sheridan* and Ninth Circuit's *Fobian* analysis as applied in *Renfrow v. Draper*, 232 F.3d 688, 694 (9th Cir. 2000)); *Three Sisters Partners LLC v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, 848 (4th Cir. 1999) (rejecting *Fobian*, concluding that it "inappropriately focuses on the presence of issues peculiar to bankruptcy law, rather than on whether the attorneys' fees are properly taken in furtherance of the [relevant contract] and applicable state law"); *Alport v. Ritter (In re Alport)*, 144 F.3d 1163, 1168 (8th Cir. 1998) (rejecting *Fobian*); *Davidson v. Davidson (In re Davidson)*, 947 F.2d 1294, 1298 (5th Cir. 1991) (allowing fees); *Transouth Fin. Corp. of Fl. v. Johnson*, 931 F.2d 1505, 1507-09 (11th Cir. 1991) (allowing fees); *Jordan v. Southeast Nat'l Bank (In re Jordan)*, 927 F.2d 221, 226-27 (5th Cir. 1991) (allowing fees); *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1168 (6th Cir. 1985) (allowing fees).

The conflict presented here is specifically recognized in the leading treatise on bankruptcy law, which criticizes *Fobian*. *See* 4 COLLIER ON BANKRUPTCY, ¶ 506.04[3][a] (15th ed. 2006) (discussing *Fobian* and stating that "[o]ther courts [of appeals] have expressly rejected *Fobian*, and properly concluded that a claim for attorney's fees arising in the context of litigating

bankruptcy issues must be allowed if valid under applicable state law") (citations omitted).

As recognized by several courts of appeals, the *Fobian* rule conflicts with prior precedents of this Court, which have concluded that the question of attorneys' fees is a matter of state, rather than federal, law. *See Security Mortgage Co. v. Powers*, 278 U.S. 149, 154 (1928) (concluding that the determination of a claim for attorneys' fees in bankruptcy presents "a question of local law"); *In re Martin*, 761 F.2d at 1168 (following *Security Mortgage* and concluding that creditor was entitled to fees).

The issue presented is important and recurring. The conflict among the courts of appeals is longstanding, widespread, entrenched, and unlikely to resolve itself absent intervention by this Court. This case presents an ideal vehicle to resolve the conflict because the court of appeals resolved the matter by applying the *Fobian* rule exclusively as an issue of law, and the resolution of the question presented is outcome-determinative. Finally, the decision below is plainly wrong. Under the *Fobian* rule, private parties are barred from contractually allocating the burden of attorneys' fees between them if the litigated issues involve questions of federal law, even though no federal statute expressly bars this common practice. The *Fobian* rule makes no sense and is plainly contrary to this Court's preemption precedents. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83, 87-88 (1994) (stating that "[t]here is no federal general common law" and that there must be a "significant conflict between some federal policy or interest and the use of state law . . . as a precondition for recognition of a federal rule of decision" in order to avoid becoming "awash in 'federal common-law' rules") (citations omitted). Accordingly, Travelers respectfully requests that the Court issue a writ of certiorari. Alternatively, Travelers requests that the Court summarily reverse the decision below.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a, is unpublished, but can be found at 2006 WL285977 (No. 04-15605) (9th Cir. Feb. 7, 2006). The opinion of the district court, Pet. App.,

4a, is also unpublished, as is the opinion of the bankruptcy court, Pet. App. 20a.

JURISDICTION

The court of appeals entered its judgment on February 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

The following statutory provisions are relevant to this petition:[2] 11 U.S.C. §§ 101(5), (12); 501; 502. Rule 3003 of the Federal Rules of Bankruptcy Procedure also is implicated. No provision of the Bankruptcy Code bars private parties from contractually allocating the burden of attorneys' fees between them in matters involving the litigation of federal bankruptcy issues.

STATEMENT OF THE CASE

A. PG&E's Bankruptcy Case And Travelers' Proof Of Claim

On April 6, 2001 (the "Petition Date"), PG&E filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. For several years prior to PG&E's bankruptcy filing, Travelers issued a variety of surety bonds on PG&E's behalf to various third parties, including the $100 million bond at issue in this matter that assures PG&E's payment of workers' compensation benefits to its employees.[3]

In connection with Travelers' agreement to issue bonds on behalf of PG&E, PG&E executed a series of indemnity agreements

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[2] The relevant text of these provisions is reproduced in Petitioner's Appendix. *See* Pet. App. 27a.

[3] The bonds were necessary for PG&E to qualify for "self-insurance" under California's workers' compensation laws. *See* CAL. LABOR CODE §§ 3700 & 3701(c) (West 2003).

in favor of Travelers, pursuant to which PG&E became obligated to indemnify Travelers in full in the event that Travelers is ever required to make payment under any of the bonds. PG&E is further obligated to reimburse Travelers for any attorneys' fees that it incurs in connection with Travelers' efforts to enforce or protect its rights incident to the bonds. The indemnity agreements provide in relevant part:

> NOW, THEREFORE, in consideration of the execution of any [of the Bonds] . . . we, the Undersigned [PG&E], agree and bind ourselves . . as follows . . . [to] indemnify, and keep indemnified, and hold and save harmless the Surety [Travelers] against all demands, claims, loss, costs, damages, *expenses and attorney's fees* whatever and all liability therefor, sustained or incurred by the Surety [Travelers] by reason of executing . . . [the Bonds] . . . or sustained or incurred by reason of making any investigation on account thereof, prosecuting or defending any action brought in connection therewith, . . . recovering or attempting to recover any salvage in connection therewith or *enforcing by litigation or otherwise any of the agreements herein contained* [including all of Travelers' rights].

ER 41, 45 at ¶ "SECOND"[4] (emphasis supplied).

In its bankruptcy case, PG&E obtained an order from the bankruptcy court authorizing, but not obligating, it to continue paying workers' compensation benefits to its injured employees. ER 1. The order did not require PG&E to continue paying benefits after it emerged from bankruptcy.[5]

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[4] Citations to "ER" are to pages of the Excerpts of the Record filed with the Ninth Circuit below.

[5] In other chapter 11 cases in which the debtor has been authorized to pay workers' compensation benefits, the debtor has discontinued doing so during the course of the case, requiring the surety to pay benefits under its bond. *See Aetna Cas. & Sur. Co. v. Clerk of*

Shortly after the Petition Date, a "bar date" was established, setting a deadline for the filing of "proofs of claim" against PG&E. *See* Fed. R. Bankr. P. 3003(c)(3); *see also* 11 U.S.C. § 501(a) (creditor may file proof of claim). A bar date is significant because a creditor who fails to file a proof of claim by the deadline is generally not entitled to vote on the debtor's reorganization plan or receive any distributions from the debtor on account of claims that were not timely filed. *See* Fed. R. Bankr. P. 3003(c)(2).

On or about September 5, 2001, Travelers timely filed a proof of claim (the "Proof of Claim"), asserting its contractual and common law rights as a surety. ER 3.[6] Among other things, Travelers held a "contingent" reimbursement claim against PG&E (a contractual claim for reimbursement under the indemnity agreements for any loss that Travelers might sustain under its bond, such as by having to pay workers' compensation benefits). A proof of claim of this type must be timely filed or the creditor will be forever barred from recovery against the debtor if the contingency ever ripens. *See Employee Ret. Corp. v. Osborne (In re THC Fin. Corp.)*, 686 F.2d 799 (9th Cir. 1982) (creditor who failed to file proof of contingent claim was barred from recovery). The indemnity agreements specifically provide for Travelers' right of indemnity, and Travelers detailed its right of indemnification in its Proof of Claim.

Travelers also explained in its Proof of Claim that, in the event that it must ever pay benefits under the bond, Travelers would also have a right of subrogation -- i.e., the right to "step into the shoes" of the injured employee whom Travelers pays and assert the employee's rights against PG&E to recover what Travelers has

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United States Bankr. Court (In re Chateaugay Corp.), 89 F.3d 942, 945-46 (2d Cir. 1996) (despite authorization, debtor stopped paying benefits during its case and surety was required to pay $38 million to cover debtor's obligations).

[6] *See* 4 AM. JUR. 2D SURETYSHIP, § 182 (1974) ("Where the surety has satisfied [its obligation], the principal is bound to indemnify him, irrespective of any express contract of indemnity.").

paid to the employee. ER 5. Under the Bankruptcy Code, if a creditor (such as an injured employee) fails to file a proof of claim, the surety who is obligated to pay the creditor on the debtor's behalf may file the claim in the creditor's stead. *See* 11 U.S.C. § 501(b).[7] Thus, in addition to filing a claim for itself, Travelers also filed a claim on behalf of all of the workers who hold workers' compensation claims against PG&E and whom Travelers might someday have to pay. ER 6. By doing so, Travelers protected both the rights of the employees and its own interests.

B. Travelers' Objections To PG&E's Disclosure Statement

During its bankruptcy case, PG&E filed a disclosure statement (the "Disclosure Statement") describing its proposed reorganization plan (the "Plan"). *See* 11 U.S.C. § 1125. To protect its contractual and common law rights, Travelers objected to PG&E's Disclosure Statement because it did not adequately describe how PG&E's Plan would treat its workers' compensation obligations or Travelers' subrogation rights, and also objected to any impairment of Travelers' indemnity rights. ER 53-60. Travelers explained the importance of PG&E's failure to disclose the proposed treatment of the claims held by workers entitled to receive workers' compensation benefits, and inquired as to PG&E's intentions. ER 71. The bankruptcy court recognized the deficient disclosure and asked PG&E's corporate parent (the "Parent")[8] what it intended to do with the claims. ER 72 ("But let's take a simple answer. What is the fate of pre-petition worker's comp claimants under the post-confirmation regime?"). The Parent replied: "[W]hat we're prepared to do, regardless of what the current state of affairs is, is just to add a statement that makes clear that the claims of the workers themselves will pass through with the reorganized debtor remaining obligated to pay for them." *Id.* Travelers inquired: "The magic words I'm hoping to

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[7] The surety's right of subrogation is preserved in bankruptcy. *See* 11 U.S.C. § 509(a).

[8] The Parent was the principal proponent of PG&E's Plan.

hear, perhaps I am hearing them, is that they're rendered unimpaired." ER 73. The bankruptcy court then stated: "Unimpaired." *Id.* The Parent replied: "Yes." *Id.*

Travelers then inquired about the treatment of its subrogation rights: "What we'd also like to know is whether our subrogation rights are being rendered unimpaired under 509(a). Simply put, that solves the problem." ER 74. The bankruptcy court asked: "Can we have a position on that?" *Id.* The Parent replied: "Your Honor, I don't believe a subrogation right is a claim against the debtor. It's the right to step into someone else's claim and whatever that treatment is, it is." *Id.* The bankruptcy court stated: "Yeah, that's what I thought too. You don't have a separate claim, you just take over the claim." ER 75. To this Travelers replied: "As long as nothing in the plan will, or purports to impair Travelers' subrogation rights, I'll settle for that." *Id.* The bankruptcy court then proposed a revision of the Disclosure Statement to resolve Travelers' objection, to which PG&E and the Parent agreed. *Id.*

The parties then negotiated specific language to be inserted into the Disclosure Statement and Plan to implement this agreement. ER 80. The parties agreed that the Plan would provide that workers' claims to workers' compensation benefits would be placed in their own class and rendered unimpaired, and that the Plan would not impair any right that Travelers would have to be subrogated to the claims of workers in the event that Travelers were ever called upon to make payment under the bonds (the "Negotiated Language").

C. PG&E's Unilateral Modification Of The Negotiated Language And Pursuit Of Litigation With Travelers

PG&E ultimately reneged on its agreement, unilaterally modified the Negotiated Language, and sued Travelers. Rather than proceeding in accordance with its prior agreement, PG&E added language to the Plan, asserting that "[n]othing herein shall affect . . . the rights of the Debtor to object, pursuant to the Bankruptcy Code, to the existence of any such subrogation rights [of Travelers]." ER 87 ¶ 4.21, 88 ¶ 11.21, 91 ¶ 4, 93 ¶ 22, 94 ¶ 21.

Then, on or about March 18, 2002, PG&E commenced litigation against Travelers by filing an objection to Travelers' Proof of Claim (the "Objection"). ER 95. In its Objection, PG&E argued that *all* of Travelers' rights and claims had to be disallowed, did not exist, or were "not valid." ER 101-11. PG&E also asked the court to disallow the claims that Travelers had filed on behalf of the injured workers under section 501(b) of the Code. ER 108-09. PG&E clearly challenged and sought to eliminate or impair Travelers' reimbursement and subrogation rights. Compelled to defend its state law rights, Travelers opposed the Objection and objected to the Plan. ER 112-66.

Following negotiations, PG&E and Travelers entered into a stipulation (the "Stipulation") to "fully resolve all objections to the Claims without further litigation." ER 170. Travelers agreed to the disallowance of its direct reimbursement claim (other than for its attorneys' fees), subject to Travelers' right to seek reconsideration in the event that Travelers is ever obligated to make payment under its bond. ER 171. Travelers' subrogation rights, including any priority to which Travelers may be subrogated, were preserved. ER 171-72. Finally, PG&E remained obligated to pay all of its workers' compensation obligations in full.

PG&E's failure to provide adequate disclosure until after litigation; its unilateral decision to alter the Negotiated Language; and its needless litigation with Travelers thereafter, caused Travelers to incur significant attorneys' fees in the defense of its rights. If Travelers had not acted to protect its rights, Travelers' rights and claims may have been discharged. To this end, the Stipulation expressly provides: "Subject to the right of a party in interest to object as provided herein, Travelers may assert its claim for attorneys' fees under the Indemnity Agreements as a general unsecured claim against PG&E." ER 172. On November 8, 2002, the bankruptcy court approved the Stipulation. ER 174.

D. Travelers' Amended Proof Of Claim And PG&E's Objection

Pursuant to the Stipulation, Travelers filed its amended proof of claim (the "Amended Claim") on or about January 6, 2003, seeking to recover the attorneys' fees it incurred in protecting its indemnity and subrogation rights during the course of PG&E's chapter 11 case, including fees incurred in pursuing its objection to the Disclosure Statement and those incurred in defending against PG&E's Objection to Travelers' claims and rights. ER 175. PG&E objected to the Amended Claim, contending, *inter alia*, that Travelers could not recover attorneys' fees for bankruptcy-related matters (the "Second Objection"). ER 266. *See* 11 U.S.C. § 502.

At a July 11, 2003 hearing, the bankruptcy court sustained PG&E's Second Objection solely on the legal ground that Travelers could not assert a claim for attorneys' fees under applicable circuit law. ER 373, 378-79. While recognizing that Travelers had the right to protect its interests, *see* ER 371, the court nonetheless ruled from the bench that Travelers' claim for attorneys' fees would be disallowed as a matter of law because they were incurred in the context of adjudicating bankruptcy-related issues, *id.* In reaching its conclusion, the bankruptcy court relied on the Ninth Circuit's prior decision in *Fobian* and subsequent cases that have followed it.

On appeal, the district court affirmed on the same ground. ER 391, 396. The district court observed that the bankruptcy court did not reach the issue of the reasonableness of Travelers' claim. ER 390. The court stated: "This is because the bankruptcy court ultimately found that Travelers' claim for attorneys' fees should be disallowed because 'as a matter of bankruptcy law, they cannot be assessed against the Debtor in any amount.'" *Id.* The district court also relied on the Ninth Circuit's decision in *Fobian* and its progeny.

On further appeal, the Ninth Circuit affirmed. Pet. App. 1a. Applying its *Fobian* rule, the Ninth Circuit found that a contractual right to attorneys' fees is enforceable only "if state law governs the substantive issues raised in the proceedings." *Id.* at 3a. Stating that "attorneys' fees are not recoverable in bankruptcy for litigating

issues 'peculiar to federal bankruptcy law,'" the Ninth Circuit held that Travelers could not recover its attorneys' fees because the dispute arose in connection with PG&E's Disclosure Statement, Plan, and objections to Travelers' claims and rights. *Id.* at 2a-3a.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the decision below deepens an entrenched conflict among the courts of appeals. In denying Travelers' claim for attorneys' fees, the Ninth Circuit followed its longstanding precedent in *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149 (9th Cir. 1991), to hold that a party cannot pursue a contractual right to attorneys' fees if the issues litigated involve questions of federal law, unless federal law authorizes the party's contractual arrangement. Three other courts of appeals also apply the *Fobian* rule in the context of litigating bankruptcy matters. In contrast, five courts of appeals reject the *Fobian* analysis and allow the recovery of attorneys' fees in the context of litigating federal bankruptcy issues if allowed under applicable contract law or state statute. Intervention by this Court is required because the conflict among the courts of appeals is longstanding, widespread, entrenched, and unlikely to resolve itself on its own.

The Court's intervention also is warranted because the issue presented is an important and recurring problem and because, as recognized by several courts of appeals, the *Fobian* rule conflicts with prior precedents of this Court, in which the Court has concluded in the bankruptcy context that the question of attorneys' fees is a matter of state, rather than federal, law.

This case presents an ideal vehicle to resolve the conflict because the court below resolved the matter applying the *Fobian* rule exclusively as an issue of law, and resolution of the question presented is outcome-determinative. Finally, the decision of the court below is demonstrably wrong. Accordingly, Travelers respectfully requests that the Court issue a writ of certiorari to review the decision of the court below. Alternatively, Travelers requests that the Court summarily reverse the decision below.

A. The Ninth Circuit's Decision Deepens A Square Circuit Conflict.

The Ninth Circuit held in this case that "attorneys fees are not recoverable in bankruptcy for litigating issues 'peculiar to federal bankruptcy law.'" Pet. App. 3a. In doing so, the court relied on its prior decision in *Fobian*. ER 303, 371-73, 396. The lower courts in this case also cited or relied on previous decisions of the Ninth Circuit adhering to the *Fobian* rule, including *Renfrow v. Draper*, 232 F.3d 688 (9th Cir. 2000); *American Express Travel Related Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122 (9th Cir. 1997); and *Ford v. Baroff (In re Baroff)*, 105 F.3d 439 (9th Cir. 1997). Pet. App. 10a, 13a, 15a-17a, 23a-25a. *See also Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Assoc.*, 322 F.3d 1039, 1059-60 (9th Cir. 2003); *Stenga v. 4M 2B Investors (In re 4M 2B Investors)*, 116 F.3d 483 (9th Cir. 1997) (unpublished); *Alvarado v. Walsh (In re LCO Enters., Inc.)*, 105 F.3d 665 (9th Cir. 1997) (Table); *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740-41 (9th Cir. 1985); *Collingwood Grain, Inc. v. Coast Trading Co., Inc.*, 744 F.2d 686, 693 (9th Cir. 1984).

In *Fobian*, the debtors filed for bankruptcy relief after defaulting on mortgage debt to a secured creditor. In the bankruptcy proceeding, the creditor sought to protect and defend its rights under sections 506 and 1225 of the Bankruptcy Code (which governed the treatment of the secured creditor's claim). The creditor incurred attorneys' fees pursuing its rights under these statutory provisions and claimed that it was entitled to its fees under the terms of its contractual loan agreement. Observing that the application of sections 506 and 1225 are matters of federal law, the Ninth Circuit concluded that any right to attorneys' fees incurred in connection with litigating the proper application of these provisions is also a matter of federal law, regardless of the applicability of the underlying provisions of the contract. The court stated: "[W]here the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorneys' fees will not be awarded absent bad faith or harassment by the losing party." 951 F.2d at 1153.

Under *Fobian*, private parties are prohibited from contractually allocating the burden of attorneys' fees between them unless federal law authorizes the agreement. In other words, *Fobian* holds that contracts otherwise valid under state law (such as mortgage loan agreements, sales contracts, and the like) cannot, as a matter of law, allocate responsibility for a party's litigation expenses unless Congress has expressly *authorized* the allocation in some manner. This rule is plainly wrong and has the analysis exactly backwards. Clearly, the correct rule is that contracts that are valid under state law may allocate litigation costs among the parties unless Congress has expressly *prohibited* them from doing so. *See Security Mortgage*, 278 U.S. at 154. Nevertheless, three other courts of appeals -- the Second, Seventh, and Tenth -- apply the *Fobian* rule. *See Burns v. Great Lakes Higher Ed. Corp. (In re Burns)*, 3 Fed. Appx. 689, 691 (10th Cir. 2001) (unpublished); *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*, 205 F.3d 532, 535 (2d Cir. 2000); *In re Sheridan*, 105 F.3d 1164, 1166-68 (7th Cir. 1997).

In contrast, five courts of appeals -- the Fourth, Fifth, Sixth, Eighth, and Eleventh -- focusing in particular on this Court's decisions, follow the rule that creditors may recover fees incurred in litigating federal bankruptcy issues. *See Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286, 1290-91 (11th Cir. 2005); *Alport v. Ritter (In re Alport)*, 144 F.3d 1163, 1168 (8th Cir. 1998); *Three Sisters Partners LLC v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, 848 (4th Cir. 1999); *Davidson v. Davidson (In re Davidson)*, 947 F.2d 1294, 1298 (5th Cir. 1991); *Transouth Fin. Corp. of Fl. v. Johnson*, 931 F.2d 1505, 1507-9 (11th Cir. 1991); *Jordan v. Southeast Nat'l Bank (In re Jordan)*, 927 F.2d 221, 226-27 (5th Cir. 1991); *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1168 (6th Cir. 1985); *Worthen Bank & Trust Co. v. Morris (In re Morris)*, 602 F.2d 826, 829-30 (8th Cir. 1979).

For example, in *In re Martin*, 761 F.2d 1163 (6th Cir. 1985), the debtor executed a loan agreement granting the creditor the right to recover attorneys' fees incurred in collecting the loan. After the debtor filed for bankruptcy relief, the creditor objected to the debtor's bankruptcy discharge (plainly an issue of bankruptcy law)

and sought attorneys' fees in connection with collecting its loan in the bankruptcy court and challenging the discharge of the debtor. Following this Court's decision in *Security Mortgage*, the Sixth Circuit concluded that the creditor held a valid claim for its fees. 761 F.2d at 1168.

In *Three Sisters Partners LLC v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843 (4th Cir. 1999), the debtor executed a lease obligating it to pay the lessor's attorneys' fees in connection with the lessor's pursuit of its rights. After the debtor filed for bankruptcy, the lessor incurred attorneys' fees in connection with its efforts to recover its property and protect its interests by seeking relief under various provisions of the Bankruptcy Code and actively participating in the case. After the debtor "assumed" the lease (i.e., agreed to be bound by its terms notwithstanding its bankruptcy filing and its right to reject the lease), the lessor sought to recover its fees. The bankruptcy court denied recovery, reasoning on the basis of *Fobian* that the lessor could not recover fees for protecting its interests in the bankruptcy court or litigating bankruptcy issues. The Fourth Circuit reversed, holding that "the bankruptcy court erred to the extent that it applied a bright-line test precluding the award of fees for actions primarily involving issues of bankruptcy law." *Shangra-La*, 167 F.3d at 852. In doing so, the Fourth Circuit expressly rejected and criticized *Fobian*, stating that the Ninth Circuit's rule "inappropriately focuses on the presence of issues peculiar to bankruptcy law, rather than on whether the attorney's actions were reasonably undertaken in furtherance of purposes for which attorney's fees are properly recoverable under the terms of the [relevant contract] and applicable state law." *Shangra-La*, 167 F.3d at 848.

In addition to the conflict among the courts of appeals on the question presented, numerous lower courts have also adopted conflicting positions. *See, e.g., In re Fast*, 318 B.R. 183, 192-94 (Bankr. D. Colo. 2004) (allowing claim for attorneys' fees); *V.M. v. S.S. (In re S.S.)*, 271 B.R. 240, 244-46 (Bankr. D. N.J. 2002) (noting that claim, if properly presented, would be disallowed); *In re Crown Books Corp.*, 269 B.R. 12, 15-18 (Bankr. D. Del. 2001) (allowing recovery of attorneys' fees); *In re Hunter*, 203 B.R. 150,

151 (Bankr. W.D. Ark. 1996) (allowing recovery of attorneys' fees); *In re Ryan's Subs, Inc.*, 165 B.R. 465, 468-69 (Bankr. W.D. Mo. 1994) (disallowing claim for attorneys' fees); *In re Child World, Inc.*, 161 B.R. 349, 353-55 (Bankr. S.D.N.Y. 1993); *In re Best Prods. Co.*, 148 B.R. 413, 414-15 (Bankr. S.D.N.Y. 1992) (disallowing claim for attorneys' fees); *James R. Barnard, D.D.S., Inc. v. Silva (In re Silva)*, 125 B.R. 28, 30-32 (Bankr. C.D. Cal. 1991) (allowing recovery of attorneys' fees); *Commercial Factors of Salt Lake City v. Jensen (In re Jensen)*, 113 B.R. 51, 53-55 (Bankr. D. Utah 1990) (allowing recovery of attorneys' fees).

It is unlikely that the existing conflict among the courts of appeals on the question presented will resolve itself. The conflict is longstanding, widespread, and entrenched. Because the relevant issues have been fully vetted in numerous published opinions, it is also unlikely that allowing the conflict to continue will shed further light on how the question presented should be resolved. Accordingly, Travelers respectfully requests that the Court issue a writ of certiorari in this case.

B. The Decision Below Conflicts With This Court's Precedents And Is Plainly Incorrect.

As noted, the analysis and holdings of *Fobian* and its progeny rest on the proposition that, in litigation involving federal bankruptcy issues, the parties' contractual allocation of liability for attorneys' fees is invalid unless *authorized* by federal law. *See, e.g., Fobian*, 951 F.2d at 1153; *Johnson*, 756 F.2d at 741 (stating that "because federal [bankruptcy] law governs the disposition of this [bankruptcy question], it should also govern the disposition of the attorney's fee issue in this case" and concluding that, because no federal statute authorized recovery of attorneys' fees, the fees were not recoverable). As this Court has explained in the bankruptcy context, however, questions regarding a party's right to attorneys' fees is a matter of *state* law. The Ninth Circuit's *Fobian* rule thus has the analysis exactly backwards.

This Court determined long ago that, "[t]he construction of the contract for attorney's fees presents . . . a question of local law." *Security Mortgage*, 278 U.S. at 154. The Court acknowledged in

Security Mortgage that bankruptcy law *might* bar the enforceability of an entitlement to attorneys' fees against the debtor's property otherwise valid under state law in so far as Congress has the authority to enact such a rule preempting state law. *Id.* Critically, however, the Court found that bankruptcy law, in and of itself, does *not* actually present any such bar: "The character of the obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy, either as a provable claim or by way of a lien on specific property." *Id.*

If an agreement allocating attorneys' fees is valid under state law, a creditor's right to payment of its attorneys' fees under that agreement constitutes a "claim" for bankruptcy purposes. 11 U.S.C. § 101(5). As this Court explained in *Security Mortgage*, the question then becomes whether federal bankruptcy law *disallows* the claim for attorneys' fees for some reason. *See* 11 U.S.C. § 502 (providing for disallowance of claims on certain enumerated grounds).

Under section 101(5), the term "claim" means any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). As the Court has explained, the term "claim," as used in the Bankruptcy Code, is an expansive concept: "a 'claim' is defined . . . as a 'right to payment,' . . . and a 'right to payment,' we have said, 'is nothing more nor less than an enforceable obligation.'" *Cohen v. De La Cruz*, 523 U.S. 213, 218 (1998) (quoting *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990)). As the Court has further explained, the terms "claim" and "debt," as used in the Bankruptcy Code, are interchangeable -- the term "debt" being defined simply as "liability on a claim." *See Davenport*, 495 U.S. at 558 ("This definition reveals Congress' intent that the meanings of 'debt' and 'claim' be coextensive."). These definitions reflect "Congress' broad rather than restrictive view of the class of obligations that qualify as a 'claim' giving rise to a 'debt.'" *Id.* (citing H.R. Rep. No. 95-595, at 309 (1977) *reprinted in* 1978 U.S.C.C.A.N. 6266 (describing definition of "claim" as the "broadest possible" and

noting that the Bankruptcy Code "contemplates that all legal obligations of the debtor . . . will be able to be dealt with in the bankruptcy case").

In *Raleigh v. Illinois Dep't of Rev.*, 530 U.S. 15 (2000), the Court explained further that, for bankruptcy purposes, a particular "right to payment" is typically a matter of state law:

> Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code. The "basic federal rule" in bankruptcy is that state law governs the substance of claims, Congress having "generally left the determination of property rights in the assets of a bankrupt's estate to state law." "Unless some federal interest requires a different result, there is no reason why [the state] interests should be analyzed different[ly] simply because an interested party is involved in a bankruptcy proceeding."

530 U.S. at 20 (quoting *Butner v. United States*, 440 U.S. 48, 54-55 (1979); *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161-62 (1946)).

The Court's decision in *Cohen v. De La Cruz* also demonstrates that a right to attorneys' fees that is valid under state law is properly a "claim" for bankruptcy purposes. In *Cohen*, the Court considered, among other things, whether a creditor's claims for treble damages, costs, and attorneys' fees could be excepted from discharge. The creditor's claim rested on a state statute providing for damages, including attorneys' fees. 523 U.S. at 223. The relevant dispute in *Cohen* arose in the context of a dischargeability proceeding -- a proceeding unique to federal bankruptcy law involving whether a particular debt would be subject to the debtor's bankruptcy discharge. *Id.* at 215. Considering the scope of the term "debt" and the question whether the term encompassed state law liability for treble damages, costs, and attorneys' fees, the Court concluded that the obligations were all valid "debts" for bankruptcy purposes. *Id.* at 223.

There is thus no reason to conclude that Travelers' claim for attorneys' fees is somehow barred as a matter of substantive bankruptcy law, which expressly *recognizes* a state law right to attorneys' fees as a proper bankruptcy claim. Accordingly, the Ninth Circuit's *Fobian* rule amounts to "what one might call 'federal common law' in the strictest sense, *i.e.*, a rule of decision that amounts, not to simply an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-43 (1981)). But under this Court's precedents, there simply is no basis for the creation of federal common law governing the ability of parties to enter into contracts allocating the burden of attorneys' fees in litigation involving federal bankruptcy issues.

The creation of a new federal common law rule of decision is justified in only the rarest of circumstances:

> The Court has said that "cases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted.'" *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966). Nor does the existence of related federal statutes automatically show that Congress intended courts to create federal common-law rules, for "'Congress acts . . . against the background of the total *corpus juris* of the states . . . .'" *Id.* at 68 (quoting H. Hart & H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953)). Thus, normally, when courts decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." 384 U.S., at 68. Indeed, such a "conflict" is normally a "precondition." *O'Melveny, supra*, at 87. *See also United States v. Kimbell*

Foods, Inc., 440 U.S. 715, 728 (1979); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

Atherton, 519 U.S. at 218-19.

In *Atherton*, the Court noted that "[n]o one doubts the power of Congress to legislate rules for deciding cases," but recognized that none of the relevant statutes enacted by Congress actually provided a rule of decision, which, in that case, involved the applicable standard of care by which a party's conduct would be judged. 519 U.S. at 219. Acknowledging the absence of a federal standard, the Court remarked: "Consequently, we must decide whether the application of state-law standards of care . . . would conflict with, and thereby significantly threaten, a federal policy or interest." *Id.* Finding no such conflict, the Court allowed the state law standard to be applied. *Id.*

Critically, neither the decision below nor the prior Ninth Circuit cases it relied upon even undertook the analysis set forth in *Atherton*, which required that the Ninth Circuit proceed cautiously, bearing in mind that no provision of the Bankruptcy Code precludes Travelers' claim for attorneys' fees. *See* 519 U.S. at 218-19. The Ninth Circuit also was required to consider that "Congress acts . . . against the background of the total *corpus juris* of the states," and to determine whether there was a "significant conflict between some federal policy or interest and the use of state law," as such a showing is a "precondition" to the creation of a federal common law rule of decision. *Id.* at 218-19. Simply put, the Ninth Circuit did not undertake the required analysis in *Fobian* or any of its progeny.

The *Fobian* line of cases also conflicts with this Court's precedents restricting the ability of federal courts to establish categorically how claims are to be treated under the Bankruptcy Code. *See United States v. Noland*, 517 U.S. 535, 540-41 (1996); *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 228-29 (1996). In *Noland*, the Sixth Circuit approved the categorical subordination of certain tax penalty claims. This Court reversed, concluding that the federal courts are not authorized to prescribe the categorical treatment of claims "at the same level at which Congress operated when it made its

characteristically general judgment to establish the hierarchy of claims in the first place." *Noland*, 517 U.S. at 540; *see also CF&I*, 518 U.S. at 228-29.

Applying the Court's reasoning in *Noland* and *CF&I* to the treatment of claims for attorneys' fees, the *Fobian* line of analysis is similarly "inappropriately categorical." *Noland*, 517 U.S. at 543. In essence, *Fobian* and its progeny establish that *all* claims for attorneys' fees arising from indemnity agreements must be categorically disallowed under the Bankruptcy Code if the fees relate to the litigation of bankruptcy issues. Policy judgments of this kind, however, are properly reserved for Congress, not the courts. Because Congress has not prescribed such a categorical exclusion in the Bankruptcy Code, the *Fobian* analysis is unsound. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 540 (1994) (proscribing "policy determinations that the Bankruptcy Code gives [the court] no authority to make").

Had Congress intended to create an exception to the allowance of claims for attorneys' fees by prohibiting claims for attorneys' fees incurred in pursuing, protecting, and defending rights in the context of a bankruptcy case because federal bankruptcy issues are involved, it could easily have done so. The fact that Congress did not create such an exception demonstrates conclusively that it intended no such exception to apply. *See FCC v. NextWave Pers. Communications, Inc.*, 537 U.S. 293, 302 (2003) ("where Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly"); *Toibb v. Radloff*, 501 U.S. 157, 161 (1991) (refusing to infer exception to section 109 of the Bankruptcy Code, stating, "Congress knew how to restrict recourse to the avenues of bankruptcy relief"); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985).

C. Alternatively, The Court Should Grant Summary Reversal.

Because the decision below is plainly in error, the Court may find it appropriate to consider summary reversal. Accordingly, pursuant to Supreme Court Rule 16.1, Travelers respectfully moves for summary reversal of the decision below.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari. Alternatively, Petitioner requests summary reversal.

Respectfully submitted,

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Dated: May 8, 2006

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED FEBRUARY 7, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-15605

D.C. No. CV-03-03499-PJH

TRAVELERS CASUALTY AND SURETY COMPANY,

Appellant,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Appellee.

Argued and Submitted October 17, 2005
San Francisco, California

MEMORANDUM*

Before: REINHARDT and THOMAS, Circuit Judges, and RESTANI**, Chief Judge, Court of International Trade.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

Appendix A

Travelers Casualty and Surety Company ("Travelers") appeals the judgment of the district court affirming the bankruptcy court's denial of attorney fees. We affirm. Because the parties are familiar with the factual and procedural history of the case, we will not recount it here.

Travelers argues that *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149 (9th Cir.1991), does not control this case and that *Fobian* was incorrectly decided. This appeal raises substantially the same issues as *DeRoche v. Arizona Industrial Commission (In re DeRoche)*, 434 F.3d 1188 (9th Cir.2006). For the reasons set forth in our opinion in *DeRoche*, Travelers' argument fails.

Travelers' argument is weaker than the argument asserted in *DeRoche*. Travelers is attempting to recover fees in bankruptcy for objections to proposed reorganization plans and related bankruptcy proceedings. Travelers' objection to the reorganization plan arose under 11 U.S.C. § 1125, and claimed only that the debtor failed to provide the required "adequate information" about the reorganization plan. Specifically, Travelers sought some assurance that its subrogation rights were being rendered unimpaired under 11 U.S.C. § 509(a). Nothing in the federal bankruptcy proceedings required Travelers to satisfy any of the obligations assured by, or to make any payment with respect to, any of its surety bonds or indemnity agreement with the debtor. Travelers did not prevail on any claim it asserted in the bankruptcy proceedings.

"[A] prevailing party in a bankruptcy proceeding may be entitled to an award of attorney fees in accordance with

applicable state law if state law governs the substantive issues raised in the proceedings." *Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9th Cir.1997). However, attorney fees are not recoverable in bankruptcy for litigating issues "peculiar to federal bankruptcy law." *Fobian*, 951 F.2d at 1153.

The resolution of all of these proceedings was governed entirely by federal bankruptcy law. Both the bankruptcy court and the district court correctly denied Travelers' claim for attorney fees. Indeed, if unimpaired, non-prevailing creditors were authorized to obtain an attorney fee award in bankruptcy for inquiring about the status of unimpaired inchoate and contingent claims, the system would likely be overwhelmed by fee applications, with no funds available for disbursement to impaired creditors or debtor reorganization.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED FEBRUARY 18, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-03-3499 PJH

In re: PACIFIC GAS AND ELECTRIC COMPANY,

Debtor.

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA,

Claimant/Appellant,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Objector/Appellee.

ORDER AFFIRMING BANKRUPTCY COURT

Appellant Travelers Casualty & Surety Company of America ("Travelers") appeals the bankruptcy court's ruling sustaining debtor and appellee Pacific Gas and Electric Company's ("PG&E") objection to Traveler's amended proof of claim. For the reasons that follow, this court affirms the decision of the bankruptcy court.

Appendix B

Prior to PG&E's chapter 11 bankruptcy filing on April 6, 2001, Travelers[1] issued a $100 million surety bond on PG&E's behalf to the California Department of Industrial Relations ("DIR"). The bond guarantees PG&E's payment of state workers compensation benefits to injured employees. In conjunction with the bond, PG&E also executed a series of continuing agreements of indemnity to Travelers in the event of a default.

To date, PG&E has not defaulted on its workers compensation obligations, and Travelers has not had to assume any liability pursuant to the bonds as a result of default. In fact, on the same day that PG&E filed for bankruptcy relief, it obtained an order from the bankruptcy court authorizing it to continue making its workers compensation payments in accordance with its pre-petition obligations.

On September 5, 2001, prior to the bar date for claims, Travelers filed a protective proof of claim ("claim") in PG&E's bankruptcy case, asserting a claim *not for default*, but instead for future reimbursement and subrogation rights it possessed under the bonds and indemnity agreements. That is, Travelers filed the claim to protect its subrogation and/or indemnification rights in the event that PG&E, in the future, defaulted on it workers compensation payments and Travelers was required to make payments under its bond.

Around the same time, on September 20, 2001, PG&E filed its first plan of reorganization and disclosure statement,

1. This includes the entities to whom Travelers is a successor-in-interest.

to which Travelers objected on November 30, 2001, on the basis that the statement failed to provide adequate information regarding the disposition of the bonds and PG&E's obligations to Travelers under the bonds. On January 14, 2002, at a hearing on the disclosure statement, the court and the parties agreed that additional language would be added to the disclosure statement addressing Travelers' concerns. Subsequently, on March 7, 2002, PG&E filed its amended disclosure statement and plan of reorganization.

On March 18, 2002, PG&E objected to Travelers' claim on the grounds that it should be disallowed under controlling bankruptcy law. Thereafter, on July 16, 2002, Travelers filed an objection to the confirmation of PG&E's amended plan, arguing that the amended plan and PG&E's objection to Travelers' claim sought to impair Travelers' rights. At a November 8, 2002 hearing on PG&E's objections to creditors' claims, including Travelers among others, Travelers and PG&E represented that they had resolved the objection to Travelers' claim.

In that stipulation, subsequently approved by the bankruptcy court, the parties agreed that, other than the attorney's fees Travelers had incurred in the course of the bankruptcy proceedings, Travelers had not been called upon to satisfy any obligations or make payments under any of the bonds. Accordingly, the parties stipulated that Travelers' claim should be disallowed based on controlling bankruptcy law, namely section 502(e)(1)(B).[2] The parties agreed

2. Bankruptcy Code section 502(e)(1)(B) provides in pertinent part that ". . . . the [bankruptcy] court shall disallow any claim for

(Cont'd)

Appendix B

(Cont'd)

reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim to the extent that — (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution."

The section was enacted "to prevent . . . competition between a creditor and [its] guarantor for limited proceeds of the estate." *Dant & Russell, Inc. v. Burlington Northern Railroad Co. (In re Dant & Russell)*, 951 F.2d 246, 248 (9th Cir. 1991)(citation omitted); 4 Collier on Bankruptcy § 502.06[2][d]. Accordingly, "section 502(e)(1)(B) is applicable to a debt owed by the debtor to a creditor which has been guaranteed by a third party." 4 Collier at § 502.06[2][d].

> If the primary obligee [in this case, PG&E workers with workers compensation claims] seeks payment from the guarantor [Travelers], the guarantor may seek reimbursement or contribution from the debtor [PG&E]. Both the primary obligee and the guarantor have a claim against the debtor that arises from the same debt; the primary obligee has a right to payment from the debtor, and the guarantor has a contingent right to reimbursement or contribution from the debtor which may become noncontingent in the event that [the debtor] fully satisfies the primary obligee's claim [workers]. By disallowing the guarantor's contingent claim for reimbursement or contribution, section 502(e)(1)(B) insures that the estate will not be liable to the primary obligee and the guarantor for the same debt.

Id.; *see also In re Dant & Russell*, 951 F.2d at 248 (noting that "a claim will be disallowed under § 502(e)(1)(B) only if (1) the claim is for reimbursement or contribution; (2) the party asserting the claim is liable with the debtor on the claim of a creditor; and (3) the claim is contingent at the time of allowance or disallowance").

however, that the disallowance did not apply to Travelers' claim for attorney's fees. Nor did the disallowance prejudice Travelers' (1) right to seek reconsideration of the disallowance in the event that, in the future, Travelers was indeed required to make payment(s) under the bonds, or (2) Travelers' subrogation rights under applicable law. Likewise, the parties agreed that the stipulation did not impair PG&E's ability to oppose a motion for reconsideration or "to object to Travelers' asserted subrogation rights." The stipulation then set forth a procedure by which Travelers would assert its claim for attorney's fees.

On January 6, 2003, Travelers submitted its amended proof of claim for attorney's fees and costs totaling over $167,000. PG&E objected to the claim on several bases, including that Travelers failed to provide sufficient documentation in support of the claim, that the fees were not compensable under the bonds or indemnity agreements, that the fees were not reimbursable based on controlling bankruptcy law, and that the fees were unreasonable.

On July 7, 2003, the bankruptcy court held a hearing on PG&E's objection to Travelers' claim for attorney's fees. After considering the parties' briefs and arguments, the court sustained PG&E's objection to Travelers' claim for attorney's fees and disallowed the claim. It subsequently entered the order sustaining the objection on July 11, 2003. Travelers appealed, and elected to have the appeal heard by this court.

Appendix B

ISSUE

This appeal involves one issue: Whether the bankruptcy court erred when it sustained PG&E's objection to Travelers' claim for attorney's fees as a matter of bankruptcy law.

DISCUSSION

As noted, Travelers' claim in this case relates only to the attorney's fees that it has expended protecting its rights pursuant to the bonds and indemnity agreements. There is no dispute that Travelers has incurred no other liability pursuant to the bonds, and that PG&E has never defaulted on the workers compensation payments.

On appeal, the parties somewhat misconstrue the bankruptcy court's July 7, 2003 ruling and the basis for its disallowance of Travelers' claim for attorney's fees. The bankruptcy court overruled PG&E's objections regarding the adequacy of Travelers' claim and did not reach the reasonableness of the claim. This is because the bankruptcy court ultimately found that Travelers' claim for attorney's fees should be disallowed because "as a matter of bankruptcy law, they cannot be assessed against the Debtor in any amount." Exh. 37 at 78.

A. Standard of Review

This court "will not disturb the bankruptcy court's refusal to award attorney's fees to [a creditor] unless the court erroneously applied the law or abused its discretion." *Renfrow v. Draper*, 232 F.3d 688, 693 (9th 2000).

Appendix B

B. Bankruptcy Law Framework

"There is no general right to recover attorney's fees under the Bankruptcy Code." *Renfrow*, 232 F.3d at 693 (citing *Kord Enterprises II v. California Commerce Bank (In re Kord Enterprises II)*, 139 F.3d 684, 687 (9th Cir. 1998)); *accord Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9th Cir. 1997). "However, a prevailing party in a bankruptcy proceeding may be entitled to an award of attorney's fees in accordance with applicable state law if state law governs the substantive issues raised in the proceedings." *In re Baroff*, 105 F.3d at 441 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 741 (9th Cir. 1985)). "Because state law necessarily controls an action on a contract, a party to such an action is entitled to an award of fees if the contract provides for an award and state law authorizes fee shifting agreements." *Id.*

Nevertheless, attorney's fees are not available despite an express contractual provision "if the 'substantive litigation raise[s] federal bankruptcy law issues rather than basic contract enforcement questions.'" *Id.* (citing *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149, 1153 (9th Cir. 1991)). This is because "the question of the applicability of the bankruptcy laws to particular contracts is not a question of the enforceability of a contract but involves a unique, separate area of federal law." *In re Fobian*, 951 F.2d at 1153 (citation omitted).

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C. Analysis

Travelers argues here, as it did below, that its attorney's fees, which it contends were contemplated by the indemnity agreements, are allowable under Ninth Circuit law because they were incurred as a result of Travelers' efforts to preserve its state law rights, including its indemnity rights under the contracts and its subrogation rights under California law.[3] Alternatively, Travelers argues that Ninth Circuit law is wrong and contrary to U.S. Supreme Court precedent.

The bankruptcy court rejected both arguments in disallowing Travelers' claim for attorney's fees. It refused to characterize PG&E's objections to Travelers' rights and claims under the bonds and indemnity agreements, in the course of the bankruptcy proceedings, as anything other than "pure Bankruptcy Code challenges." *Id.* at 76. It noted that the proceedings regarding Travelers' rights were nothing more than "a pure bankruptcy 502 type challenge," and that there was no risk any greater than that which creditors normally face in a bankruptcy case.[4] The court further concluded that the Supreme

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3. Travelers argues that it is entitled to its fees pursuant to contract and to state law. The Indemnity Agreements provide in relevant part that Travelers is entitled to attorney's fees sustained in "enforcing by litigation or otherwise any of the agreements. . . ." However, because the bankruptcy court concluded that federal bankruptcy law foreclosed attorney's fees in the case, it did not rule on the contract interpretation issue.

4. Bankruptcy Code section 502 deals with the allowance and disallowance of claims in a bankruptcy case, and provides the rules and procedures for determining allowable claims. *See generally* 4 Collier on Bankruptcy § 502.01.

Court case cited by Travelers was distinguishable, and that it was not inconsistent with the Ninth Circuit cases on point.

For the reasons that follow, this court affirms.

I. The Bankruptcy Court Applied the Appropriate Legal Standards

Travelers argues that this court should disregard Ninth Circuit precedent relied on by the bankruptcy court because it constitutes "a fundamental departure" from other Ninth Circuit and Supreme Court precedent.

On appeal, Travelers relies on two recent Ninth Circuit cases, both involving pre-petition litigation, for the proposition that its claim for attorney's fees is proper in this case. *See Abercrombie v. Hayden Corp. (In re Abercrombie)*, 139 F.3d 755 (9th Cir. 1998); *Kadjevich v. Kadjevich (In re Kadjevich)*, 220 F.3d 1016 (9th Cir. 2000).[5] However, Travelers fails to mention that the post-petition attorney's fees at issue in both of those cases arose from pre-petition litigation or collection efforts. *See Abercrombie*, 139 F.3d at 756 (state supreme court awarded creditor attorney's fees in breach of contract action initiated by debtor three years prior to bankruptcy); *Kadjevich*, 220 F.3d at 1018 (creditor/brother of debtor brought breach of settlement agreement and fraud action against debtor two years prior to bankruptcy filing). In other words, the debtor in *Kadjevich* defaulted prior to filing for bankruptcy protection, and the creditors in both *Kadjevich* and *Abercrombie* pursued litigation or collection

5. Interestingly, this is not an argument that Travelers made before the bankruptcy court.

actions in state court prior to the bankruptcy filings. Accordingly, the facts and the legal issues in those cases were quite distinct from the situation here.

As noted, it is undisputed that there were no pre-petition collection efforts or litigation related to the bonds or indemnity agreements in this case *since there was no default.* Moreover, the legal issue in *Abercrombie* and *Kadjevich* was distinct from that here, and involved whether or not the attorney's fees in those cases should be treated as priority administrative expenses under the Bankruptcy Code or simply as nonpriority claims. There is no issue as to priority or administrative expense in this case. Therefore, neither case undermines the controlling Ninth Circuit precedent, as applied by the bankruptcy court and by this court on appeal.

Nor is this Ninth Circuit precedent inconsistent with the Supreme Court and other Ninth Circuit cases on which Travelers relies. Travelers contends that the Ninth Circuit's decisions in *In re Fobian*, *Renfrow*, and *Baroff* are contrary to the Supreme Court's 1928 decision in *Security Mortgage Co. v. Powers*, 278 U.S. 154 (1928), the Supreme Court's more recent decision in *Cohen v. De La Cruz*, 523 U.S. 213 (1998), and the Ninth Circuit's 1964 decision in *Hartman v. Utley*, 335 F.2d 558 (9th Cir. 1964). *All* of these cases, however, are distinguishable from the case at hand, and none call into question the Ninth Circuit's holdings in the controlling cases. *See, e.g., Security Mortgage*, 278 U.S. at 152-53 (*oversecured* creditor may recover portion of attorney's fees incurred in pursuing collection action on a defaulted secured note in state court); *Cohen*, 523 U.S. at 218-19 (concluding that creditors' claim for treble damages,

attorney's fees and costs awarded pursuant to state consumer fraud act were nondischargeable pursuant to Bankruptcy Code § 523); *Hartman*, 335 F.2d at 559 (allowing portion of surety's attorney's fees incurred *following the debtor's default* under surety bond).

II. The Bankruptcy Court Appropriately Characterized the Proceedings Giving Rise to Travelers' Attorney's Fees as Pure Bankruptcy Litigation

Travelers argues that the fees and expenses that it incurred in the course of PG&E's bankruptcy case were incurred primarily to protect its indemnification and subrogation rights, which it contends are state law rights. Below, in making this argument, Travelers seemed to distinguish between its contingent indemnification or reimbursement rights and its subrogation rights, focusing primarily on its subrogation rights. Presumably, this was because the treatment of Travelers' contingent reimbursement (also known as indemnification) rights was clearly controlled by Bankruptcy Code section 502(e)(1)(B), the stipulated basis for the disallowance.[6] *See also* Exh. 37 at 20-22, 46 (noting

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6. Below, Travelers argued that it had to object to PG&E's disclosure statement "in order to determine if its subrogation rights would remain following" PG&E's reorganization. Travelers also contended that it was forced to respond to PG&E's efforts to cut off its subrogation rights by objecting to PG&E's plan. In focusing specifically on its subrogation rights, Travelers noted that it:

> never had any objection to having our contingent reimbursement claim disallowed. That was not an issue.

(Cont'd)

that Travelers was forced to protect its rights in part because PG&E allegedly sought to treat its subrogation rights the same as its contingent reimbursement claims). On appeal, though, Travelers does not make the same distinction. *See* Travelers' Opening Br. at 18 ("[I]n this instance, Travelers incurred its fees in connection with the pursuit and protection of its state-law subrogation *and* reimbursement rights.")(emphasis added).

Even though the parties and the bankruptcy court correctly recognized that there may be a distinction regarding the treatment of prospective subrogation rights and contingent reimbursement rights under the Bankruptcy Code, any such distinction, however, is not dispositive of the ultimate issue on appeal. The attorney's fees that Travelers expended in "protecting" its rights, whether they are characterized as contingent reimbursement or subrogation rights, should be disallowed for the reasons applied in the Ninth Circuit's *Fobian* and *Johnson* cases, reiterated by the Ninth Circuit in *Renfrow* and *Baroff*, and applied by the Ninth Circuit BAP in *Hassen Imports v. KWP (In re Hassen Imports Partnership)*, 256 B.R. 916 (9th Cir. 2000).

(Cont'd)

> We didn't litigate over that. We didn't press that. And we resolved the 502 issue in our stipulation. But what we were fighting about and what we fought about and what we had to brief in response to the Debtor's objection was that *a subrogation right is not the same thing as a contingent reimbursement claim.*

Exh. 37 at 49-50 (emphasis added).

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In *Johnson*, the Ninth Circuit held that the bankruptcy court erred when it applied state substantive law awarding fees to a creditor who prevailed in an action on a motion for relief from stay. 756 F.2d at 741. The court ruled that the stay litigation was not an "action on a contract," to which state law regarding attorney's fees applied. *Id.* at 740. Likewise, in *Fobian*, the Ninth Circuit held that a creditor who was the prevailing party in a plan confirmation battle, similar to Travelers' plan and disclosure statement objections here, was not entitled to attorney's fees because the litigation involved solely issues of federal bankruptcy law and could not be considered "an action on the contract." 951 F.2d at 1153. This was despite a provision in the promissory note and deed of trust providing for fees and costs incurred in the enforcement of the *Fobian* creditor's rights. *Id.*

In *Hassen*, it was the debtor who sought attorney's fees, but the facts and issues were similar to this case. The debtor in *Hassen* was a car dealership, and the creditor bank held a promissory note secured by a deed of trust on the debtor's real property. The debtor successfully defended a contentious motion for relief from stay, and a contentious plan confirmation battle. Subsequently, the debtor sought attorney's fees under state law related to the stay motion and the plan confirmation proceedings. The Ninth Circuit BAP rejected the debtor's "attempt[] to incorporate state substantive law in the context of the bankruptcy case." *Id.* at 923. In affirming the bankruptcy court, the appellate court noted: "The bankruptcy court correctly observed that the fight over confirmation was not an action on the Note, but an action on an entirely different contract: the Plan [of

Reorganization]." *Id.* Relying on *Johnson*, the *Hassen* court then held:

> Absent such a Congressional mandate, the state law of attorney's fees is simply inapplicable in a matter involving bankruptcy substantive law. We will not convert a bankruptcy issue into a state law question . . . based [on] how the parties drafted the Note. That would elevate form (of the Note) over substance (of the bankruptcy disputes). Stated otherwise, the nature of the issues litigated arise solely in bankruptcy and federal bankruptcy attorneys' fees policy is clear and well-settled and may not be abrogated by artful drafting.

Id.

Much like the debtor in *Hassen*, Travelers "seeks an award of attorneys' fees in uniquely bankruptcy matters, relying not on bankruptcy authority, but attempting to import [state law] into this exclusive federal setting." *Id.* at 920. The matters for which Travelers seeks attorney's fees involve exclusively bankruptcy proceedings, including the claims allowance process under section 502, and plan and disclosure statement objections and proceedings under chapter 11. For the reasons set forth in *Fobian*, *Renfrow*, *Baroff*, *Johnson*, and *Hassen*, the measures employed by Travelers cannot be considered "an action on the contract[s]" or bonds.

Nor is this court persuaded by Travelers' other arguments, appropriately rejected by the bankruptcy court. No one, including the bankruptcy court, has disputed

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Travelers' right to file a proof of claim in an attempt to protect its rights and its ability to move for reconsideration under Bankruptcy Code section 502(j) in the event of default. However, the propriety of filing the claim is not at issue. Instead, the issue is whether the bankruptcy estate is liable for the attorney's fees that Travelers incurred in filing the claim. As noted by the bankruptcy court, while Travelers "had every right to . . . protect[] its position by negotiating with the plan and disclosure statement," this court likewise disagrees that the estate is required to pay for Travelers' exercise of that right. *See* Exh. 37 at 77.

Moreover, as pointed out by the bankruptcy court, the worst case scenario that Travelers alluded to below and in its briefs before this court was highly unlikely. A default judgment was very unlikely given the fact that the events were occurring within the context of pure bankruptcy proceedings, the claims allowance process and plan confirmation, and no adversary proceeding was ever commenced. As noted by the bankruptcy court, it understood Travelers' argument that there:

> may be [something] lurking between the lines with something more than the objection to claim. I just simply don't buy it. I recognize that maybe you and your client had no choice but to protect your position. . . . but that I don't think there was a risk there. This was an objection to claims. It wasn't more than that, and I don't believe under the traditional default rule, you could have done any worse than have had the claims disallowed.

Id. at 76-77. This court likewise finds Travelers' dire predictions unconvincing. There is nothing to suggest that Travelers was

being treated differently than any other creditor or surety in the bankruptcy proceedings that would justify allowance of its attorney's fees in this case.

CONCLUSION

For the reasons above, the bankruptcy court's decision sustaining PG&E's objection to Travelers' claim for attorney's fees is AFFIRMED. Additionally, this court determines that oral argument is unnecessary pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 8012, as the facts and legal arguments are adequately presented in the briefs and record in this case, and oral argument would not significantly aid this court in its decision.

This order fully adjudicates the appeal and terminates all pending motions for this case. The clerk shall close the file.

IT IS SO ORDERED.

Dated: February 18, 2004

/s/
PHYLLIS J. HAMILTON
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION DATED JULY 11, 2003

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Case No. 01-30923 DM

Chapter 11 Case

Date: July 11, 2003
Time: 1:30 p.m.
Place: 235 Pine Street, 22nd Floor
San Francisco, California

In re

PACIFIC GAS AND ELECTRIC COMPANY,
a California corporation,

Debtor.

Federal I.D. No. 94-0742640

ORDER ON DEBTOR'S OBJECTION TO AMENDED CLAIM OF TRAVELERS CASUALTY AND SURETY COMPANY, ET AL.

At the date and time set forth above, the Bankruptcy Court held a hearing on the objection (the "Objection") submitted by Pacific Gas and Electric Company, the debtor and debtor-in-possession in the above-captioned Chapter 11

case ("PG&E" or the "Debtor"), to the amended claim, assigned Claim No. 8869 (the "Amended Claim"), submitted by Travelers Casualty and Surety Company and certain related entities (collectively, "Travelers"). Appearances were as noted in the record.

The Court having considered the Objection, Travelers' Response to the Objection, the Debtor's Reply to such Response, the record in this case, and any admissible evidence and argument presented to the Court, hereby finds as follows:

A. Adequate notice of this proceeding was given to parties in interest as appropriate under the circumstances.

B. The Objection involves a matter of law which can be disposed of at the initial hearing on the Objection pursuant to Bankruptcy Local Rule 3007-1 for the Northern District of California.

C. There is good cause for sustaining the Objection.

Based on the foregoing, **IT IS HEREBY ORDERED** that the Objection is sustained and the Amended Claim is disallowed in its entirety, for the reasons stated on the record.

DATED: July 11, 2003

s/ Dennis Montali
HONORABLE DENNIS MONTALI
UNITED STATES BANKRUPTCY JUDGE

APPENDIX D — TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION DATED JULY 11, 2003

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

Case No. 01-30923 DM

Chapter 11

San Francisco, California
July 11, 2003
1:29 p.m.

In re:

PACIFIC GAS AND ELECTRIC COMPANY,
a California Corporation,

Debtor.

TRANSCRIPT OF PROCEEDINGS
OBJECTION TO AMENDED CLAIM OF TRAVELERS CASUALTY & SURETY COMPANY, et al.

BEFORE THE HONORABLE DENNIS MONTALI
UNITED STATES BANKRUPTCY JUDGE

* * *

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[3] THE CLERK: Rise please. The court is now in session, The Honorable Dennis Montali presiding.

THE COURT: Good afternoon. Please be seated.

* * *

THE COURT: Okay. Listen. I appreciate all the work and all the sophisticated legal theories. I'm going to resist the temptation to take the matter under advisement. I'm going to sustain the Debtor's objections, Mr. Brunstad, and I'll explain myself.

First of all, what I'm going to overrule the Debtor, is on any adequacy of the Proof of Claim. Indeed, your Proof of Claim was filed, but without as much data and documentation as maybe it might have been, but we're dealing with experienced counsel who know how to exchange information and so, just as if I were going to have an evidentiary hearing, I might give the Debtor more time to [76] deal with the specifics that only came more recently, I'm not going to fault Travelers for having this Proof of Claim sort of gradually grow into the five-pound document it is.

So the Debtor's points on that theory are rejected. I'm satisfied, having listened to the arguments and looked at the documents and my familiarity with the cases — I won't lie to you; I didn't go back and read *Security Mortgage* this morning. But I'm going to tell you how I deal with the *Security Mortgage* argument.

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First of all, I do think Mr. Kaplan is correct that the challenges to the Travelers claim were in fact all Bankruptcy Code challenges. If he had filed an adversary proceeding to declare some or all of the indemnity agreements or the bonds or whatever invalid, and had gone for declaratory relief and certainly had sought that kind of relief, I might not come out the same way. But the legal theory of the Debtor's challenge to the claims is pure bankruptcy.

* * *

As far as the protecting — Travelers protecting its position by negotiating with the plan and the disclosure statement, of course, you had every right to do that. We're back to the same thing I said before; I just don't think the Debtor has to pay for it, because I think it's bankruptcy law.

So then I come to *Security Mortgage*, and of course, I can joke that we in the Ninth Circuit are — have our own rules here, but we do honor Supreme Court cases. I think *Security Mortgage* is distinguishable, but even if it isn't, I'm bound to follow Nine Circuit precedent, and you're going to have to convince the Ninth Circuit that it was wrong in all those other cases. And *Fobian* and *Renfrow* [78] and others, some of which I did simply refer to in that *Hassen Imports* case, they have made it clear to me, although I see it more often than not in a credit card dischargeability case that where liability is not an issue but dischargeability is, the creditor doesn't get his attorney's fees. Where liability is challenged and dischargeability is, the court has to sort it through. And I see no difference in other aspects of bankruptcy application, and I am not prepared to say that one little piece of concern

about what was sought in the objection to claim implicated your client's State law rights such that you can now invoke the attorney's fees provision.

So I don't think *Security Mortgage* has been ignored by the several Ninth Circuit cases, but even if it has, I'm bound to follow Ninth Circuit authority, and I'm going to follow it. And I think that Mr. Kaplan's arguments are well taken here. So I don't need to get to the question, and I won't address the question, of whether the fees were reasonable in whole or in part. I simple agree with Mr. Kaplan that as a matter of bankruptcy law, they cannot be assessed against the Debtor in any amount. So I will sustain the objections for those reasons. I will ask Mr. Kaplan to submit — he's already got it in his hand — submit a form of order that simply recites that the objections are sustained for the reasons stated on the [79] record.

MR. KAPLAN: Your Honor, may we approach with the proposed order?

THE COURT: Show it to counsel.

But, Mr. Brunstad, I do appreciate the very, very thorough legal analysis of the issues, and the fact that I may come out disagreeing with you doesn't mean I don't very much respect your analysis of the theories — or Mr. Kaplan's. And this is a stimulating and challenging area in a frankly obscure area of the law, as you know.

* * * *

APPENDIX E — RELEVANT STATUTES

11 U.S.C. § 101

§ 101. Definitions

In this title the following definitions shall apply:

* * *

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

* * *

(12) The term "debt" means liability on a claim.

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11 U.S.C. §501

§ 501. Filing of proofs of claims or interests

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

(b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

* * *

11 U.S.C. §502

§ 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a

hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

* * *

(c) There shall be estimated for purpose of allowance under this section—

> (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or
>
> (2) any right to payment arising from a right to an equitable remedy for breach of performance.

* * *